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No. 84-1086

In the Supreme Court of the United States

OCTOBER TERM, 1984

SIDNEY PERKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that the district court erred in refusing his request on the eve of trial for a continuance of some unspecified duration to enable him to consider whether to retain additional counsel, because the attorney who was representing him and his two wholly owned corporations indicated that he needed more time to prepare the case.

1. Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to defraud the United States, in violation of 18 U.S.C. 371; two counts of bribery, in violation of 18 U.S.C. 201(b); five counts of offering gratuities, in violation of 18 U.S.C. 201(f); three counts of wire fraud, in violation of 18 U.S.C. 1341; nine counts of filing false statements, in violation of 18 U.S.C. 287; and conducting the affairs or an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962. He was sentenced to

ten years' imprisonment, to be followed by a five-year term of probation. Petitioner also was ordered to pay fines totalling $195,000.

The evidence at trial established that petitioner, acting through two co-defendant corporations wholly owned by him (Pet. 3 n.1)[1] and four other corporations, rigged bids submitted by these entities to the Defense Industrial Supply Center in Philadelphia. At trial, petitioner and his two wholly owned corporations were represented by the same counsel. Prior to trial, petitioner had furnished the district court with an affidavit waiving his right to be represented by separate counsel (Pet. 5). Nevertheless, on the eve of trial, the district court advised petitioner, in accordance with Fed. R. Crim. P. 44(c), that he was entitled to separate counsel "to avoid conflicts of interest" (Pet. 6). Following consultation with counsel, petitioner informed the court that because his attorney "needs more time to review this case to be adequately prepared, I feel I would like to consider time now to get additional counsel" (*ibid.*). The district court denied petitioner's request, finding "that it is unlikely that a conflict of interest will arise" (*ibid.*). By judgment order, the court of appeals affirmed the convictions of petitioner and the two corporations (Pet. App. A1-A3).

2. Petitioner's contention that the district court was required to accede to his request for additional time to consider whether to retain additional counsel is wholly without merit. The Sixth Amendment guarantees a criminal defendant the assistance of counsel unimpaired by a

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[1]Petitioner owned North Broward Industries and Southern Commercial, Inc., both of which were named, together with two other individuals, as co-defendants in the 42-count indictment. Although petitioner and his two corporations jointly appealed their convictions (see Pet. App. A1-A3), the two corporate entities have not joined petitioner in the instant petition or otherwise sought certiorari.

conflict of interest. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 70 (1942). It thus requires that when a defendant's request for separate counsel focuses "on the probable risk of a conflict of interests," the trial court must "either * * * appoint separate counsel or * * * take adequate steps to ascertain whether the risk [of conflict is] too remote to warrant separate counsel." *Holloway* v. *Arkansas*, 435 U.S. 475, 484 (1978) (footnote omitted). But nothing in the Sixth Amendment prevents a district court from exercising its discretion to avoid undue delay in the conduct of proceedings before it. As this Court recognized in *Holloway*, where a request "for separate counsel is made for dilatory purposes," its holding "does not impair the trial court's ability to deal with counsel who resort to such tactics" (435 U.S. at 486-487).

Here, petitioner owned and controlled the very corporations with which he shared counsel, and he previously had filed an affidavit with the district court waiving his right to be represented by separate counsel. Thereafter, at the suggestion of the Assistant United States Attorney and out of an abundance of caution, the district court conducted an inquiry under Fed. R. Crim. P. 44(c). Petitioner did not then request "separate" counsel on the ground that the lawyer who was representing him and his two wholly owned corporations had a conflict of interest. Instead, he requested time to "consider" whether to retain "additional" counsel because that attorney had stated "that he needs more time to review this case to be adequately prepared" (Pet. 6). Petitioner does not argue that the district court's denial of his request for additional time (*i.e.*, a continuance) in fact caused counsel to render ineffective assistance at trial because he was not adequately prepared or because he needed the assistance of the "additional" counsel to prepare and present the defense. Compare *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983). Because that was the only basis of his request in district court, petitioner is not entitled to relief.

Petitioner now attempts to characterize his request for separate counsel as one based on a potential conflict of interest. On that premise, he argues that the district court was required to honor his request and that a per se rule requiring reversal of his conviction is compelled by the Sixth Amendment. See Pet. 7-8, 12-13. As we have shown, however, there is no factual basis for this argument, because the colloquy quoted in the petition demonstrates that petitioner did not request separate counsel because of an alleged conflict of interest, and he previously had signed an affidavit waiving his right to separate counsel. What is more, the district court expressly found that because the two co-defendants were corporations owned and controlled by petitioner, it was unlikely that a conflict of interest would arise.[2] Neither petitioner nor his attorney took issue with this finding at the time or otherwise gave any indication whatever that a conflict of interest existed. Compare *Holloway* v. *Arkansas*, 435 U.S. at 485-486. Nor does petitioner challenge the district court's finding in this Court or suggest that any conflict of interest in fact developed at trial.

This Court made clear in *Holloway* v. *Arkansas, supra*, that even where the issue of a possible conflict of interest is raised, appointment of separate counsel is not required where, as here, the risk of a conflict of interest is "too remote to warrant separate counsel." 435 U.S. at 484 (footnote

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[2]Indeed, it is hard to conceive how the situation could generate a conflict of interest prejudicial to petitioner. Should his interests somehow diverge from those of his corporations, it would remain exclusively within petitioner's power to direct counsel how to proceed.

omitted).[3] Further review of petitioner's fact-bound claim is unwarranted.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1985

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[3]Petitioner errs in contending (Pet. 8, 12) that other courts of appeals have applied a per se rule requiring reversal of a conviction where the trial court did not order separate representation following an objection by the defendant to multiple representation. In *United States* v. *Ramsey*, 661 F.2d 1013, 1018 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982), and *Wilson* v. *Morris*, 724 F.2d 591, 593 (7th Cir.) (en banc), cert. denied, No. 83-6462 (May 14, 1984), upon which petitioner relies (Pet. 8, 12), the court of appeals stated only that reversal is required where the district court fails even to inquire into the basis for the objection or the adequacy of the representation in the face of a potential conflict of interest. In the instant case, by contrast, the district court satisfied itself that a conflict of interest was unlikely to arise. In *United States* v. *Mers*, 701 F.2d 1321 (11th Cir.), cert. denied, 464 U.S. 991 (1983), upon which petitioner also relies (Pet. 8, 12), the court likewise did not suggest such a per se rule. It observed that this Court implied in *Holloway* v. *Arkansas, supra*, "that reversal would be automatic 'whenever a trial court *improperly* requires joint representation over timely objection.' " 701 F.2d at 1327, quoting 435 U.S. at 488 (emphasis added). A requirement of joint representation is not "improper" where, as here, the trial court determines that a conflict is unlikely to arise. The court of appeals' order affirming petitioner's conviction in the instant case thus does not conflict with these other decisions, even if we assume, contrary to the record, that petitioner actually objected to joint representation on the ground of a conflict of interest.

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